United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1147

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant,

v.

ANTHONY JAMES SEBASTIAN a/k/a TONY SEBASTIAN and PATRICK GIBBONS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, CR. 1973-237.

BRIEF FOR THE APPELLANT

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Preliminary Statement

The United States of America appeals from an Order of the Honorable John T. Curtin, United States District Court Judge for the Western District of New York, entered on December 21, 1973 suppressing certain Government evidence in a prosecution of defendants Anthony James Sebastian and Patrick Gibbons for uttering and passing forged United States savings bonds, and for conspiracy to do so, in violation of Title 18, United States Code, Section 472 and 371, respectively.

The evidence so suppressed consists of certain stock certificates, credit cards and payroll checks seized from defendant Gibbons by a deputy sheriff of Marion County, Ohio; and a written statement taken from defendant Sebastian by a United States Secret Service Agent in Buffalo, New York.

The District Court suppressed this evidence at the conclusion of the Suppression Hearing when the Government declined to turn over to the appellees the investigative files of the sheriff of Marion County, Ohio and portions of the investigative file of the United States Secret Service in Buffalo, New York. The District Court ordered this material turned over at the Suppression Hearing based solely upon the Jencks Act, 18 United States Code, Section 3500.

On January 14, 1974 the Government filed a Notice of Appeal pursuant to Title 18, United States Code, Section 3731.

Questions Presented

1. Does the Jencks Act, 18 United States Code, Section 3500, authorize a District Court Judge to require the Government to turn over to the defense at a pre-trial Suppression Hearing, all or portions of the investigative files of Government witnesses who testify at the pre-trial hearing concerning the obtaining of certain challenged evidence?

2. Are investigative files of state and federal agencies subject to production at trial under the Jencks Act as a "statement" as defined in subsection (e) of 18 United States Code, Section 3500.

Statement of Facts

On June 21, 1973, appellees were indicted for passing and uttering forged United States savings bonds, and conspiracy to do so, in violation of 18 United States Code, Section 472 and 371, respectively.

On December 19, 1973, the District Court held a Suppression Hearing on defense motions to suppress certain items of Government evidence. Two Government witnesses testified at this hearing.

The first witness, Gary C. Behm, a deputy sheriff of Marion County, Ohio, testified to the arrest of defendant Patrick Gibbons in the State of Ohio on December 8, 1972 on a state charge of passing forged checks and to a contemporaneous search and resulting seizure of four challenged items of evidence: (1) Five stock certificates in the name of Robert Goulder (Government Exhibit #1) (2) Twenty-six credit cards in the name of Robert Goulder (Government Exhibit #2) (3) Sixteen Blauer Manufacturing Company checks payable to Robert Goulder (Government Exhibit #3) (4) Sixty blank Blauer Manufacturing Company checks (Government Exhibit #4). These items were stolen from the Robert Goulder residence in Ohio on May 14, 1972, along with the United States savings bonds which are the subject of the indictment in the present case. See Transcript of Suppression Hearing (hereinafter designated as Tr.) p. 5, pp. 13-19. Subsequent to Deputy Sheriff Behm's direct examination, the District Court ordered the Government to turn over to defense counsel the investigative files of the Sheriff of Marion County, Ohio. These files related not only to defendant Gibbons but also to a codefendant in the Ohio check forging case, a George A. Green, who is not a defendant in the case-at-bar. The Ohio Sheriff's investigative files, Court Exhibits 1, 2, and

3, all sealed exhibits, include, among other things, a complaint sheet or investigative report, a personal file on Gibbons and a personal file on Green (Tr. pp. 20-27). The Court ordered the Government to turn over the Ohio Sheriff's investigative files on the grounds that the files are Section 3500 or Jencks material and, as such, must be turned over to the defense at a pre-trial Suppression Hearing. To reach this result, the Court interpreted the word "trial" in Title 18 United States Code Section 3500(a) to include a pre-trial Suppression Hearing. The Government declined to turn over the Ohio investigative files on the ground that Jencks material should not be disclosed until after the witness has testified on direct examination at *trial,* as opposed to a pre-trial hearing. The Government cited as authority for its refusal *United States v. Covello,* 410 F2d 536 (2nd Cir., 1969), cert. den. 396 U.S. 879 (1969) (Tr. pp. 30-31).

The second Government witness, Samuel J. Zona, a United States Secret Service Agent in Buffalo, New York, testified to his arrest of defendant Anthony James Sebastian on May 24, 1973 and to Sebastian's subsequent execution of a written waiver of rights form (Government Exhibit No. 5) and a signed written statement (Government Exhibit No. 6) (Tr. pp. 41-45). Subsequent to Agent Zona's direct examination, the District Court requested the Secret Service's investigative file (Government Exhibit No. 4, a sealed exhibit) for review and thereafter directed the prosecutor to designate that portion of the Secret Service investigative file, which, in his Court, would normally be required to be turned over to the defense attorney as Jencks material. These items were marked as Court Exhibits Nos. 5 and 6 and are also sealed exhibits. The Court directed that this material be turned over to the defense attorneys at the hearing. The Government made the same objection to such disclosure (Tr. pp. 45-56).

Both Government witnesses testified that they consulted limited portions of their investigative files before taking the witness stand solely to refresh their recollection as to times and dates (Tr. pp. 20-21, 23, 45-46). In addition, the Court made it clear that its ruling was not based on "that old rule of evidence which pertains to civil cases and other cases than when a witness reviews a statement, a record he made on a prior occasion, that if he uses that to refresh his recollection for trial that it should be made available for cross examination." (Tr. p. 47). Instead, the Court specifically stated that it was relying upon the Jencks Act, 18 United States Code Section 3500, in ordering the Government to disclose the investigative files at the hearing (Tr. pp. 21, 26, 29-34, 47-48).

In response to defense motions, the Government represented and continues to represent, that it has no material exculpatory to the defendants under the doctrine of *Brady v. Maryland,* 373 U.S. 83 (1963). (See Response of Government to defendant Sebastian's motion and Response of Government to defendant Gibbons' motion.)

At a prior Suppression Hearing held before the same judge, three weeks earlier on November 20, 1973 in *United States v. Annette Nugent, Manuel Perdomo, Stephen E. Levy and Daniel A. Nugent* (CR. 1973-97; CR. 1973-224), the Court announced its intention to prospectively require the Government turn over those portions of the investigative report of Government witnesses which relate to testimony given by them upon direct examination at pre-trial hearings. (See the Appendix for the Appellant, p. 12.) The case-at-bar represents the first attempt by Judge Curtin to put this policy into effect. As Judge Curtin stated at the hearing: "you realize under the sort of general rule that I intend to enforce in these cases, and that

is at the time of hearing that I want any thirty-five hundred material" (Tr. p. 21). At the earlier hearing in the *Nugent* case, the Court seemed not only to condition its prospective ruling upon the Jencks Act but appeared to have intended it also as a disciplinary measure directed at the federal agency involved in that case in order to force that agency to change their reporting methods, which the judge characterized as like "soup". (Appendix for Appellant, pp. 6-8.)

At the conclusion of the hearing on December 19, 1973, Judge Curtin, based upon the Government's refusal to turn over the investigative files in question, suppressed all the Government's evidence; and on December 21, 1973 entered a written order accordingly.

On January 14, 1974 the Government filed a Notice of Appeal pursuant to Title 18 United States Code, Section 3731 and on that day, as required by Section 3731, certified that the appeal was not taken for the purpose of delay and that the evidence suppressed is substantial proof of facts material in the case.

ARGUMENT

POINT I

The Jencks Act, 18 United States Code Section 3500, does not require the Government to turn over statements of its witnesses until they have testified on direct examination at trial.

The Jencks Act, 18 United States Code, Section 3500 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination *in the trial* of the case. (Emphasis added)
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

The Jencks Act was enacted September 2, 1957, as a reaction to what Congress saw as "loose interpretation by lower Federal courts of the Supreme Court decision" in *Jencks v. United States,* 353 U.S. 657, decided on June 3, 1957. The legislation was drafted to correct this loose interpretation and to establish "a uniform procedure throughout the Federal courts so that law-enforcement agencies and defendants will not be confronted with different interpretations and different rulings." (H.R. Rep. No. 700, 85th

Cong., 1st Sess., July 5, 1957, pp. 4-5; see also S.Rep. No. 569 85th Cong., 1st Sess., July 1, 1957, p. 2.)

The legislative history surrounding the passage of the Jencks Act makes it abundantly clear that statements of Government witnesses are not subject to production until the witness has been called and has testified for the Government at trial.

A brief recital of some of this history will show this to be the case. On June 28, 1957, Attorney General Herbert Brownell, Jr., testified at a hearing before the Senate Subcommittee on Improvements in the Federal Criminal Code, which Subcommittee was part of the Committee on the Judiciary. The Subcommittee was considering legislation, specifically S.2377, to amend procedures for production of statements and reports in federal criminal cases in light of *Jencks v. United States, supra.* Attorney General Brownell testified that some lower Federal courts had erroneously interpreted the Supreme Court decision in *Jencks, supra,* to require *pre-trial* production of Government reports. Attorney General Brownell stated that the legislation now under consideration, which had been drafted by the Department of Justice, would solve this problem by setting definite guidelines for the trial court; "the effect of the bill would be to establish . . . that statements and reports to be used for impeachment of a Government witness are not subject to production until the witness has been called and has testified for the Government". (S.Rep. No. 569, 85th Cong., 1st Sess., July 1, 1957, pp. 7-8, see also H. Rep. No. 700, 85th Cong., 1st Sess., July 5, 1957, pp. 11-12.)

The Senate Judiciary Committee issued a second report on the proposed legislation to clarify procedures after *Jencks* (S.Rep. No. 981, 85th Cong., 1st Sess., August 15,

1957). In this Report, the Committee catalogued as part of the laundry list of horrors following *Jencks*, a Federal Court decision in the Southern District of Texas where the trial judge had instructed the United States Attorney to turn over the entire investigative file in a pending criminal case for examination by the defense prior to trial. The Committee specifically stated that this was a misinterpretation and misunderstanding of the *Jencks* decision and that the legislation under consideration was designed to correct this problem (S.Rep. No. 981, 85th Cong., 1st Sess., August 15, 1957, p. 3). As the Committee stated: "one of the causes of misrepresentations is the fact that there appears to be great uncertainty as to when the statements of witnesses are to be produced . . . The committee is of the opinion, and the bill so provides, that statements of witnesses should not be subject to production until the Government witness who is the punitive source of such statements, has himself testified. In other words, it is the specific intent of the bill to provide for the production of statements, reports, transcriptions of recordings, as described in the bill, after the Government witness has testified against the defendant under direct examination in open court, and to prevent disclosure before such witness has testified." (S.Rep. No. 981, *supra*, p. 4). In an Appendix to this Report, the Committee stated that the overwhelming judicial thought since *Jencks* does *not* apply to *pre-trial* production of statements which, instead, are governed exclusively by the Federal Rules of Criminal Procedure 16 and 17(c) (S.Rep. No. 981, pp. 8-9).

The discussion on the floor of the Senate, contemporaneous with the Report, further demonstrates Congress' intention that the proposed legislation did not encompass pre-trial disclosure of statements of Government witnesses. For example, Senator Cooper in discussing the question on

the floor of the Senate on August 23, 1957 stated that S.2377 provided a limitation that Government records will be produced only after the witness had testified. Senator O'Mahoney, the floor manager of the bill, responded that Senator Cooper was correct in his understanding and added that the records would only be turned over after the witness had testified *at trial* (Congressional Record, Senate, p. 15783, August 23, 1957).

In an insert to the Congressional Record by Senator O'Mahoney on August 26, 1957, S.2377 is described as specifically providing that statements and reports of a Government witness shall be produced only after such witness has testified on direct examination during the trial and that S.2377 will correct the misinterpretation of the *Jencks* decision of some Federal Courts who had required the Government to turn over these statements prior to trial (Cong. R. pp. 15939-15940).

The language differences between the House (H.R. 7915) and the Senate (S.2377) bills were worked out in conference. The resulting legislation dramatically demonstrates the intention of Congress. S.2377 originally provided in pertinent part:

> "(a) In any criminal prosecution brought by the United States, any rule of Court or procedure to the contrary notwithstanding, no statement or report of any prospective witness or person other than a defendant which is in the possession of the United States shall be the subject of subpena, discovery or inspection, except as provided in paragraph (b) of this section."

The Conference Committee added to subsection (a) of Section 3500 in S.2377 above, the phrase which appears in the law "until said witness had testified on direct examination in the trial of the case." The purpose of this phrase was to "make it abundantly clear that no such statement

need be produced until said witness has testified on direct examination in the trial". (Cong. R. 1271, 85th Cong., 1st Sess., August 30, 1957, p. 3). When the Conference report was presented to the House, on August 30, 1957 Representative Keating, one of the floor managers in the House, explained that the reason for the addition of the phrase quoted above was that "there was fear that there was language in section (a) of the Senate bill (S.2377) which would imply the right of defendants to get such evidence before they ever got into the courtroom. The wording here not only does not recognize that they might have such a right, but positively and definitely says they shall not have that right." (Cong. R., House, p. 16739, August 30, 1957).

Thus, both the wording of the Jencks Act and the pertinent legislative history make it abundantly clear that Congress did not intend production of statements of Government witness at anytime prior to trial.

The case law following enactment of the Jencks Act recognizes and implements this clear intent of Congress. The first case to come up to the Supreme Court after passage of the Jencks Act, construing the Act was *Palermo v. United States*, 360 U.S. 343 (1959). In *Palermo*, the Supreme Court after examining the legislative history and the clear wording of the Act, sets forth guidelines for construction of the statute:

> ". . . the detailed particularity with which Congress has spoken has narrowed the scope for needful judicial interpretation to an unusual degree. The statute clearly defines procedures and plainly indicates the circumstances for their application. (p. 349)"

The Second Circuit has consistently followed this guideline in construing the Jencks Act. The most recent case involving the question of pre-trial disclosure of Jencks material is *United States v. Percevault* (slip opinion at

pp. 1269-1281), decided by the Second Circuit on January 8, 1974. In *Percevault*, District Court Judge Weinstein had directed the Government to disclose to the defense certain material encompassed within the Jencks Act prior to trial. In reversing Judge Weinstein, the Second Circuit in an opinion written by Chief Judge Kaufman held that the District Court has no discretion under Jencks Act to order pre-trial disclosure of statements within the Act:

> "The Jencks Act, which is the exclusive vehicle for disclosure of statements made by Government witnesses, *Palermo v. United States*, 360 U.S. 343 (1959), was intended to serve several purposes. On the one hand, it protects the rights of a defendant by requiring the court to give the defendant access to relevant prior statements of a witness after the witness has testified at trial (18 U.S.C. 3500(b)). On the other hand, the prosecution cannot be compelled to disclose statements of the witness before he has testified on direct examination (18 U.S.C. 3500(a)). This unique but limited discovery device represents a legislative determination that access to a witness's statement could be useful in impeaching a witness but was not intended to be utilized in preparation for trial. *Palermo v. United States*, supra, 360 U.S. at 349; 1957 U.S. Code Cong. & Adm. News 1862-64, 1869. But see *Brady v. Maryland*, supra. Since the only statements in issue here are clearly those of prospective witnesses and are accordingly within the scope of 18 U.S.C. 3500(a), the district court did not have the statutory authority to compel disclosure, over the government's objection, prior to trial. (pp. 1273-1274)."

Thus *Percevault* clearly establishes that a District Court has no authority to require the Government to disclose statements of its witnesses prior to the time the witness testifies at the trial of the case. The Second Circuit in another case, *United States v. Covello*, 410 F.2d 536 (2nd Cir., 1969); cert. denied 396 U.S. 879 (1969) held that the word "trial" which appears in Title 18 United States Code,

Section 3500(a) means trial, and does not mean a pre-trial suppression hearing. In reaching this conclusion, Judge Waterman writing for the Second Circuit, stated:

> "The Act was enacted by Congress in order to qualify the loose interpretations the lower federal courts had accorded the Supreme Court decision in *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed. 2d 1103 (1957), and to provide an exclusive procedure for handling demands by a defendant for the production of statements reports, and similar material that government witnesses had given to law enforcement agencies prior to the defendant's trial. (p. 543)"

The *Covello* court went on to distinguish that case from *United States v. Foley*, 283 F.2d 582 (2d Cir. 1960). It is the *Foley* case that Judge Curtin in the case-at-bar read as leaving the question of the timing of the production of Jencks material to the "discretion" of the trial judge. A close reading of *Foley* indicates that this is not correct. In *Foley*, the Second Circuit denied the Government's petition for the extraordinary writ of mandamus (*Will v. United States*, 389 U.S. 90, 107 (1967)) to direct a District Court Judge to vacate orders for a hearing and for a production of documents in a pre-indictment proceeding by taxpayers to suppress certain evidence pursuant to Federal Rule of Criminal Procedure 41(e). The Government resorted to a writ of mandamus, the second applied for in the case, prior to attending the scheduled hearing. The primary reason for the Second Circuit's denial of the Government's writ appears to be that the Government's request for a writ was premature since the Government asked for it prior to the hearing and prior to sanctions having been taken against the Government for failure to produce the documents. Directing itself to this point the Court stated:

> "We see no indication from the transcript of the argument that the judge will require any disclosure to the

> taxpayers of Government files unrelated to the narrow issue of the legal search inconsistent with the applicable principles of law. (p. 584)"

Just prior to the above quoted statement, the Second Circuit listed the Jencks Act as one of those "applicable principles of law." Furthermore, the bulk of the documents at issue in *Foley* do not fall within the Jencks Act.

The Second Circuit in *United States v. Percevault, supra,* addressed itself to the question of the District Court Judge's "discretion" in administering the Jencks Act:

> "We should note finally that we see nothing inconsistent between our holding that the trial judge is prevented by the Jencks Act from ordering pretrial disclosure of statements made by a prospective government witness over the government's objection, and cases which have afforded the district judge a measure of discretion in administering the Act. *Those cases did not consider the timing of the disclosure,* but focused instead on a definition of the term 'statement', *United States v. Augenblick,* 393 U.S. 348, 355 (1969); *Palermo v. United States,* supra, 360 U.S. at 355; or a determination of the appropriate procedures for transmission of Jencks Act material at trial, *United States v. Gardin,* 382 F.2d 601 (2d Cir. 1967)." (Emphasis added)

Thus, reading *Percevault* and *Covello* together, the Second Circuit clearly holds that the District Court has no authority under the Jencks Act to require the Government to disclose statements of its witnesses prior to trial and that trial does not encompass a pre-trial suppression hearing.

The conclusion reached by the Second Circuit in *Covello* and *Percevault* has also been reached by three other Circuits, the Fifth, the Seventh and the Tenth. No Circuit appears to have held *contra.*

In *United States v. Montos*, 421 F2d 215 (5th Cir. 1970), cert. denied 397 U.S. 1022 (1970), the defendant, on appeal from a conviction for theft of certain coins from the United States mails, contended that under the Jencks Act he was entitled to the postal agent's written report at a pre-trial suppression hearing held to determine whether to suppress coins seized from the defendant and defendant's written statement. In approving the district court's refusal to require the Government to turn over its report at the pre-trial hearing, the Fifth Circuit commented:

> "According to the express terms of the Jencks Act, however, Montos (the defendant) was not entitled to examine the report until Stokes (the agent) had testified 'on direct examination in trial of the case', 18 U.S.C. Section 3500(a) (1964), and due process does not require premature production at pretrial hearings on motions to suppress of statements ultimately subject to discovery under the Jencks Act." (pp. 220-221)

To the same effect is *United States v. Lyles*, 471 F2d 1167 (5th Cir., 1972).

The Seventh Circuit in *United States v. McMillan* (7th Cir., October 17, 1972) granted the Government's petition for a writ of mandamus where a district court judge had ordered the Government to turn over to the defense prior to trial statements of all co-defendants, some of whom were to be Government witnesses at the trial.

The Seventh Circuit read Title 18 United States Code, Section 3500(a) and Federal Rules of Criminal Procedure 16(g) to prohibit a district court judge from ordering production of statements of Government witnesses before they have testified at the trial.

The Tenth Circuit came to a similar conclusion in a case involving a Magistrate's refusal to turn over written statements of Government witnesses at a preliminary hearing

prior to indictment. (See Robbins v. United States, 476 F2d (10th Cir., 1973).) In reaching this conclusion the Tenth Circuit stated:

> "Appellant argues that since a preliminary hearing has been held to be a critical stage of criminal process requiring assistance of counsel, it follows that no limitation may be placed on the rights of defense counsel to fully cross-examine a witness and require the production of any statement the witness may have made or adopted.
>
> The Court is bound to follow the requirements of the Jencks Act. The language of that statute is clear . . . The Act . . . provides that the statement or report shall not be disclosed until the witness has testified on direct examination 'in the trial' of the case. A preliminary hearing can scarcely be characterized as a trial. (p. 32)"

Thus, it is clear that the Jencks Act does not require the Government to turn over statements of its witnesses until they have testified at trial and that Judge Curtin abused his discretion by making such an order.

POINT II

Investigative files of state and federal agencies are not "statements", as defined in Subsection (e) of Tile 18 United States Code Section 3500, and so are not subject to production under the Jencks Act.

"Statement" is defined by subsection (e) of the Jencks Act as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

The clear intent of the Jencks Act is to proscribe the production of investigation files of agencies. *United States v. O'Connor,* 273 F2d 358 (2d Cir., 1959). If, however, an agent testifies at trial on the results of his investigation, the defense would be entitled to that portion of the investigative file which constitutes the agent's report (*United States v. O'Connor, ibid.*) and which related to his trial testimony (18 U.S.C. § 3500(c)); *United States v. Birnbaum,* 337 F2d 490, 497-498 (2nd Cir., 1964).

Consequently, if Deputy Sheriff Behm were to testify at the trial in the case concerning his arrest of defendant Gibbons and subsequent seizure of certain stock certificates, credit cards and payroll checks (Government Exhibits 1, 2, 3 and 4), only a very limited portion of the Marion

County, Ohio Sheriff's investigative file (Government Exhibits 1, 2 and 3) would be required to be turned over to the defense. The Jencks material portion of the investigation file would in that case be Deputy Sheriff Behm's report relating to defendant Gibbons' arrest and resulting seizure. The investigative file of the United States Secret Service Agency (Government Exhibits 4, 5, and 6), would be similarly treated.

As argued in Point I of appellant's brief, the Government's position is that disclosure of any portion of the investigative files at the Suppression Hearing level is untimely. However, since the issue of the scope of Jencks material will undoubtedly arise at the trial of the case, when appellate review may be unlikely, appellant presents this issue at this time so that the issue may be clarified for the future.

Conclusion

For the foregoing reasons, the order of the District Court suppressing the Government's evidence should be reversed.

Dated: Buffalo, New York, March 7, 1974.

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